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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OCT 30 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Preemption of State and Local	)	**MM Docket No. 97-182**
Land Use Restrictions on the	)	
Siting, Placement and Construction	)	
of Broadcast Station Transmission	)	
Facilities	)	

To: The Commission

COMMENTS OF THE AMERICAN RADIO RELAY LEAGUE, INCORPORATED

The American Radio Relay League, Incorporated (the League), the national association of amateur radio operators in the United States, by counsel and pursuant to Section 1.415 of the Commission's Rules (47 C.F.R. §1.415) hereby respectfully submits its comments in response to the *Notice of Proposed Rule Making* (the Notice), FCC 97-296, released August 19, 1997 in the captioned proceeding. The Notice considers whether, and to what extent, State and local land use regulations which affect the installation and maintenance of radio and television broadcast antenna facilities should be preempted. The League, in the interest of furthering a comprehensive facilities siting policy, including the preemption of certain unduly burdensome land use regulations affecting radio and television transmitting facilities, states as follows:

1. The Commission has consistently, since 1985, expressed support for the effective, reliable performance of the communications facilities to which it has issued licenses. It has treaded lightly on State and local police power zoning jurisdiction during that twelve-year period, however, and has recognized that it must strike a balance between the legitimate and traditional

land use regulatory jurisdiction of municipalities, and the superseding jurisdiction of the Commission over interstate telecommunications. The Commission's first venture into this area was in the issuance of a declaratory ruling dealing with amateur radio antennas. *Amateur Antenna Preemption*, 101 FCC 2d 952 (1985), *codified at* 47 C.F.R. §97.15(e). The Commission's guidance in this area to municipalities has generally been positive, but certain inherent vagueness in the Commission's statement of policy, and intervening court rulings circumventing the Commission's intent in that matter have rendered it less useful over time than the Commission intended.[1]

2. Shortly after the issuance of *Amateur Radio Preemption*, the Commission issued a Report and Order relative to Satellite Receive-Only Earth Station Antennas, Docket 85-87; 100 FCC 2d 846, 59 RR 2d 1073 (1986); *reconsideration denied*, 2 FCC Rcd 202 (1987). That ruling was narrowly drawn to address only certain types of transmit and receive earth station antennas. The policy that resulted from it was codified at 47 C.F.R. §25.104. Neither that, nor the Amateur Preemption order, was intended to completely preempt State or local land use jurisdiction over the siting of such antenna systems. Rather, they were both limited preemption policies, and both were issued with the understanding that the Commission would not become involved in local land use regulatory disputes; nor did the Commission intend to become so embroiled. Rather, the policies were issued with the understanding that the licensee or antenna user would have to apply the Commission policies in administrative or judicial forums.

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[1] See, the discussion contained in a pending Petition for Rule Making filed by the League on this subject, RM-8763, filed February 7, 1996.

3. There followed a series of court cases attempting to interpret both preemption policies. Court challenges to certain land use regulations affecting amateur radio and satellite earth station antennas continue to the present time. In some cases, the outcome favored the communications licensee or antenna owner. In others, the municipality or land use authority prevails. The Commission has remained uninvolved in those proceedings, and has never been made a party to any local litigation over antenna authorizations. This changed following the enactment of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996), which affected local land use regulation of small satellite dish antennas, MMDS antennas, and antennas for television broadcast reception. Section 207 of the Telecommunications Act specifically ordered the adoption by the Commission of a comprehensive preemption policy regarding those types of (typically residential) antenna installations. The rule adopted by the Commission in the *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rule Making*, FCC 96-328, released August 6, 1996, adopted a comprehensive policy, constituting essentially total preemption of both governmental and private land use regulation of those types of antennas (and only those types). It also embroiled the Commission in adjudications of waivers of the preemption policies, if certain burdens of proof are met by the land use authority concerned.

4. The 1996 Telecommunications Act, at 47 U.S.C. §332, also addressed land use regulation of construction and placement of "personal wireless service" facilities. There was essentially no Federal preemption of land use regulation of those facilities created by the Telecommunications Act, and in fact the Act directed personal wireless service providers adversely affected by municipal land use regulation decisions to the courts, rather than to the Commission. However, there was a requirement that personal wireless service facilities be

accommodated (i.e. that there be no CMRS entry regulation); that the state or local authority act on siting requests within a reasonable time; and that there be no denial of siting authority based on a state or local statute or ordinance regulating exposure of the public to radio frequency energy, which is more burdensome than the applicable Federal standard for such facilities.

5. The Commission is separately considering whether or not to preempt municipal moratoria (open-ended or fixed duration) on the siting of telecommunications facilities. See, the *Public Notice*, FCC 97-264, released July 28, 1997. Now, the instant proceeding seeks to determine whether or not, and to what extent, DTV rollout in particular, and broadcast service generally, requires protection from State and local land use regulation.

6. The League submits that the Commission's review of land use regulation of transmission antennas is long overdue. The same types of land use regulations that affect broadcast transmission antennas are regularly faced as well by amateur radio licensees,[2] and have served as barriers to effective amateur radio operation for many years, notwithstanding the 1985 preemption order, its subsequent codification in the Commission's Rules, or the case law applying the policy. Land use regulations intended to address aesthetics by limiting antenna height; instances of radio frequency interference to home electronic equipment; overly burdensome setback restrictions; RF exposure concerns; sunset provisions for non-conforming uses; and other issues are routinely invoked by State and local land use regulators in an often-cloaked effort to preclude the installation or maintenance of communications facilities.

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[2] The considerations tend to be the same. The factors typically considered by municipal land use authorities for broadcast, CMRS, PMRS, amateur, and other transmission antennas typically include aesthetic impact (including impact on property values), safety characteristics, RF energy exposure, RF interference to home electronic equipment, and other environmental impact issues.

7. Unfortunately, what is revealed by the foregoing historical review of the Commission's various preemption efforts is a stunning lack of consistency, and the absence of a comprehensive policy on land use preemption to accommodate communications facilities. For example, the Commission stated in its 1985 amateur radio preemption order that it had no interest in land use regulation of communications facilities based on private deed restrictions (a/k/a covenants, or "CC&Rs") because those were stated to be private contractual matters. The Satellite Receive-Only Earth Station preemption order, at footnote 62 specifically disclaimed any application to private land use regulations. Yet, the Commission unhesitatingly preempted private land use regulation of DBS/MMDS/TVBS antennas in its August 6, 1996 Report and Order. In that proceeding, it disclaimed any application of its preemption policies to V-sat facilities, apparently solely because of some unspecified antenna size criterion. In the 1985 amateur preemption decision, and the 1986 Satellite receive-only earth station decision, the Commission stated its intention not to become involved in local land use regulatory processes. Now, however, it regularly reviews such decisions after exhaustion of local administrative remedies, but prior to judicial appeal. *See, e.g. Michael J. MacDonald,* CSR 4922-O, DA-97-2189, released October 14, 1997; *Jay Lubliner and Deborah Galvin,* CSR 4915-O, DA 97-2188, released october 14, 1997; and *CS Wireless Systems, Inc.,* CSR 4947-O, DA 97-2187, released October 14, 1997. Finally, the Commission has preempted land use regulation of private wireless facilities premised on radio frequency emissions to the extent that a facility complies with Commission RF exposure guidelines. This policy exists pursuant to specific Telecommunications Act requirements, but the Commission has not taken similar preemption action with respect to other types of communications facilities. It makes no sense to preempt State and local RFR regulations for one

of the radio services regulated by the Commission but not other services. If the applicable Federal standard is the preemptive standard for one radio service, it must be for all. Any other policy is arbitrary.

8. The Commission should indeed preempt unreasonable land use regulation of broadcast facilities, as requested by the National Association of Broadcasters and the Association of Maximum Service Television. It should do so quickly, so as to facilitate the rollout of digital television, and because currently, there is a plethora of new land use regulations intended to limit the explosive growth of CMRS antenna facilities. These new regulations will and do seriously inhibit the installation of new broadcast antenna facilities. However, the Commission should not adopt new regulations in a vacuum. It should, instead, harmonize its various preemption policies in the context of a comprehensive plan for facilities siting. This is not to suggest that all communications antennas should be exempt from State or local regulation, or that State and local land use authorities must treat different antenna facilities without distinction. Indeed, there are tremendous differences between the land use considerations applicable to a 1,000-foot television broadcast tower on the one hand, and a ground-mounted satellite receive antenna in a residential zone on the other. However, preemption of covenant regulation of communications antennas should be consistently applied, for example, as should preemption of State and local regulation of RFR exposure.

9. The League has had on file with the Commission a petition for rule making, RM-8763, for more than one and one-half years now. It was filed February 7, 1996, and it asked for some straightforward modifications in the Commission's preemption policy relative to amateur radio antennas, to preclude municipalities from acting contrary to the Commission's intent. The

Commission has taken no action on that petition, except to accord it a file number. The relief requested therein, and the premises for the petition (though now somewhat dated in view of subsequent Commission actions discussed above), are relevant to the Commission's consideration of the appropriate preemption policy for land use regulation of broadcast transmitting antennas. The issues are also most urgently needed by the Commission's 750,000 licensees in the Amateur Radio Service. The League respectfully requests that the Commission address the League's February 7, 1996 petition for rule making contemporaneously with any action in the instant proceeding. More urgently, however, it is requested that the Commission harmonize its various disparate, and often conflicting policies toward land use regulation of communications facilities, either in this proceeding or in a companion proceeding. It is understood that different bureaus of the Commission regulate different radio services, and therefore might view and administer the Commission's land use preemption policies in different ways. This is not, however, consistent with the Commission's obligation to assure a rapid, efficient Nation-wide and world-wide radio communication service with adequate facilities. 47 U.S.C. §151; nor is it a plan which encourages the provision of new technologies and service to the public. 47 U.S.C. §157.

Therefore, the foregoing considered, the American Radio Relay League, Incorporated respectfully requests that the Commission adopt future land use preemption policy, and resolve the instant proceeding and the League's pending petition for rule making, RM-8763, in accordance with a comprehensive land use preemption policy which will bring some modicum of consistency to the Commission's hodge-podge of varied, and often conflicting, preemption policies.

Respectfully submitted,

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October 30, 1997